BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
05/18/23
04:59 PM
A2205015

Application of Southern California Gas Company (U904G) for Authority, Among Other Things, to Update its Gas Revenue Requirement and Base Rates Effective on January 1, 2024.	Application 22-05-015
And Related Matter.	Application 22-05-016

PUBLIC ADVOCATES OFFICE RESPONSE TO SOUTHERN CALIFORNIA GAS COMPANY'S MOTION TO STRIKE PORTIONS OF TESTIMONY AND WORKPAPERS BASED ON FIRST AMENDMENT CLAIMS

TRACI BONE
Attorney for the

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2048
Cell Phone: (415) 713-3599
E-Mail: traci.bone@cpuc.ca.gov

May 18, 2023

I. INTRODUCTION

Pursuant to Rule 11.1(e) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules), the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) hereby responds to Southern California Gas Company's (SoCalGas) Motion to Strike information from Cal Advocates' testimony and workpapers based on First Amendment claims (Motion).[1]

SoCalGas seeks to strike the following two items from Cal Advocates' testimony related to SoCalGas' pattern and practice of booking political activities to ratepayer accounts:

- The entire discussion in the testimony entitled "Vendor Paid To Drive Speakers To Commission Business Meetings";[2] and
- Work Paper (WP) 62, a contract between SoCalGas and the vendor it paid to provide speakers at Commission Business Meetings (Vendor Contract).[3]

SoCalGas insists that these "materials cannot properly be disclosed in this proceeding, or any proceeding"[4] based on the determinations made in *Southern California Gas Co. v. Pub. Util. Comm'n*, 87 Cal.App.5th 324 (2023) (Appellate Court Decision).[5] With regard to these materials, SoCalGas claims that "the protected status of Agreement No. 5660056525 is undisputed."[6]

SoCalGas' claims have no merit.

SoCalGas' claims before the Appellate Court were limited to *100% shareholder funded* information. In other words, the utility objected to providing Cal Advocates

---

[1] *Motion of Southern California Gas Company to Strike Portions of Testimony and Workpapers Containing First Amendment Protected Materials [Expedited Ruling Requested],* filed in A.22-05-015 on May 3, 2023.

[2] The testimony entitled "Vendor Paid to Drive Speakers To Commission Business Meetings" is available at Ex. CA-23 at Section II.A.5, pp. 23-24.

[3] SoCalGas 5/3/23 Motion to Strike, p. 1.

[4] SoCalGas 5/3/23 Motion to Strike, p. 2.

[5] A Lexis version of the Appellate Court Decision is Attachment 1 hereto.

[6] SoCalGas 5/3/23 Motion to Strike, p. 3.

information regarding the costs of activities booked to 100% to shareholder accounts.[7] As the Appellate Court Decision explains, SoCalGas "has always maintained that its shareholder information (not its ratepayer information) is privileged by constitutional rights to free speech and freedom of association."[8]

SoCalGas has admitted that the costs associated with the Vendor Contract were booked to a ratepayer account.[9] And while SoCalGas now claims it always intended to book the costs of the Vendor Contract to shareholders,[10] such claims are not controlling.[11] The fact is that the costs of the Vendor Contract were booked to a ratepayer account and the work was performed using monies from a ratepayer account. It was not until Cal Advocates requested the contract that SoCalGas then booked the costs of that contract and others to FERC Account 426.4, a "below the line" or "shareholder" account.[12]

In sum, the question presented here – and never presented to the Appellate Court – is whether SoCalGas may book the costs of its political activities to ratepayer accounts, then, if and when caught, move them to a shareholder account and claim First Amendment protection. The simple answer is "no."

The utility makes much of the "ongoing harm that has been caused by exposing [its] protected materials to public view through submission in this rate case."[13] SoCalGas' claims of harm are misplaced. It is SoCalGas' ratepayers – not the utility –

---

[7] *See* Attachment 1 - Appellate Court Decision. There can be no question that the Decision was limited to shareholder accounts. That Decision specifically refers to shareholder funded accounts more than thirty times, and never suggests that the holdings addressed ratepayer accounts.

[8] Attachment 1 - Appellate Court Decision, Lexis p. 7.

[9] The Vendor Contract at issue, Agreement No. 5660056525, was booked to the Balanced Energy Work Order Authorization (Balanced Energy WOA). That WOA directed that all costs be booked to FERC Account 920. *See* Ex. CA-23-WP 183.

[10] *See* Ex. CA-23-WP 159 p. 7 ("The Balanced Energy internal order (IO) 300796601 was created in March 2019 for tracking all costs associated with Balanced Energy activities and the intent was to make it a shareholder funded IO. However, an incorrect settlement rule was set up for this IO to FERC 920.0 A&G Salaries, consequently, the costs initially settled to the incorrect FERC account.")

[11] *See* discussion at Section II.C below regarding a recent SoCalGas claim of accounting error where the utility included $4 million in legal fees for pro-gas advocacy activities in the current GRC.

[12] *See* discussion at Section II.A here identifying SoCalGas' admissions.

[13] SoCalGas 5/3/23 Motion to Strike, p. 3.

who have been harmed; indeed, it is they, not the utility, that have the legitimate First Amendment claim. This is because, as demonstrated in Cal Advocates' testimony, SoCalGas has routinely used ratepayer accounts to fund its political activities. This violates its ratepayers' rights against compelled speech.[14]

Cal Advocates' reliance on the information provided in the Vendor Contract – the costs of which were booked to a ratepayer account – is appropriately produced in this and any other proceeding addressing the utility's accounting practices and misuse of its ratepayer accounts to fund legal and political activities to support the continued use of natural gas.

II. DISCUSSION

A. The Commission Should Address SoCalGas' Motion to Strike Holistically

On or about November 5, 2019, SoCalGas produced a number of contracts, including the Vendor Contract at issue here, in response to a Cal Advocates' data request issued August 13, 2019 that asked for "all contracts (and contract amendments) covered by the WOA which created the BALANCED ENERGY IO."[15] In response to SoCalGas' objections to that data request, the Commission's President tasked Administrative Law Judge DeAngelis with resolving the discovery dispute, which resulted in an order requiring the utility to produce the contracts requested.[16]

By SoCalGas' own admission, all the contracts that SoCalGas eventually produced in response to that data request were booked to FERC Account 920, a ratepayer funded account. These contracts were only moved to FERC Account 426.4 – the FERC account political activities must be booked to – after Cal Advocates' requested them.[17] Thus, at

---

[14] *See, e.g., Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

[15] *See* Ex. CA-23-WP 320 PDF p. 496, Data Request CalAdvocates-SC-SCG-2019-05, August 13, 2019, Q. 8 ("Provide all contracts (and contract amendments) covered by the WOA which created the BALANCED ENERGY IO.).

[16] That ALJ Order is available at https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/legacy3/4---alj-ruling-11-1-19.pdf

[17] *See* Ex. CA-23-WP 159.

the time Cal Advocates requested the contracts, they were clearly booked to ratepayers and therefore could not have been protected by any First Amendment claims.

On April 20, 2023, noting Cal Advocates' reliance on the Vendor Contract in its testimony (Ex. CA-23), SoCalGas issued a letter to both the Commission's General Counsel and Cal Advocates' Chief Counsel claiming that Cal Advocates' use of the Vendor Contract "contravenes the judgment of the California Court of Appeal."[18] SoCalGas demanded, among other things, that Cal Advocates "return all copies of the contracts and other materials that were produced under protest in response to Cal Advocates' data requests."[19]

Recognizing that SoCalGas sought the return of documents produced outside of this proceeding, Mr. Moldavsky, on behalf of the Commission, advised SoCalGas to seek relief by filing a motion before Administrative Law Judge DeAngelis. ALJ DeAngelis oversaw the discovery process that resulted in SoCalGas' production of the documents in the first place and wrote the decision that SoCalGas appealed.[20]

Despite the Commission's having laid out a path for SoCalGas to pursue the relief it seeks, SoCalGas now seeks to address the implications of the Appellate Court Decision in this GRC by way of its Motion to Strike.

Given the guidance provided by Mr. Moldavsky on behalf of the Commission, the long history of the dispute between the parties, and the significant implications of the Commission's response to the Appellate Court Decision, Cal Advocates respectfully proposes that the issues presented in SoCalGas' Motion to Strike be addressed by the Commission through the mechanism identified by the Commission's counsel.

[18] SoCalGas April 20, 2023 letter to Hammond and Farrar, p. 2

[19] SoCalGas April 20, 2023 letter to Hammond and Farrar, p. 2

[20] Mr. Moldavsky's email is attached to SoCalGas' 5/3/23 Motion to Strike.

B. SoCalGas Mischaracterizes The Appellate Court Decision

SoCalGas' Motion gives the false impression that the Appellate Court specifically addressed the issue of the Vendor Contract at issue here, found it to be protected by the First Amendment, and ordered it to be returned.[21] This is not the case.

As described briefly above, the Court only addressed the issue of whether Cal Advocates could have access to the utility's "100% shareholder accounts." The Court's decision found that Cal Advocates needed to make a greater showing of need to overcome the utility's First Amendment claims.[22] It was not sufficient for Cal Advocates (or the Commission) to simply rely on the Public Utilities Code requirements that the utility make all of its accounts available to the Commission and its staff; the court found that a greater showing was required to overcome First Amendment concerns related to political activities that were 100% shareholder funded.[23]

SoCalGas now leans on the Court's limited ruling to demand that Cal Advocates and the Commission return all the materials SoCalGas produced under protest. SoCalGas conveniently ignores a number of facts demonstrating that the Appellate Court Decision does not require the Commission or Cal Advocates to comply with any of SoCalGas' demands:

- The Appellate Court Decision does not order the return of any materials;
- Cal Advocates is free to make a further showing of need for the information before the Commission, and this showing could survive a First Amendment challenge;
- The Court was unaware of the fact that SoCalGas booked the costs of numerous political campaigns to ratepayer accounts; and

[21] In a May 25, 2023 email to Mr. Farrar, SoCalGas' Counsel claimed that Cal Advocates was in "violation of the Court of Appeal's binding judgment…" That email is attached to SoCalGas' 5/3/23 Motion to Strike.

[22] Attachment 1 - Appellate Court Decision, Lexis p. 15. In sum, by relying only on its statutory authority, the Commission failed to sufficiently demonstrate the compelling government interest in disclosure.

[23] *Id.*

- The Court was unaware of SoCalGas' practice of claiming "error" when found booking advocacy costs to ratepayers.

SoCalGas' Motion to Strike is based entirely upon a fictional expansion of the Appellate Court Decision, ignores key facts, and should therefore be denied.

C. SoCalGas' Booking of Advocacy Costs To Ratepayers Appears To Be Systemic

The Court was only aware of SoCalGas' use of ratepayer accounts to fund the Californians for Balanced Energy Solutions (C4BES) campaign. Cal Advocates' testimony (Ex. CA-23) in this proceeding demonstrates that SoCalGas has an established practice of booking advocacy costs to ratepayer accounts. Specifically, before Cal Advocates' Accounting Review was cut short by the utility's refusal to cooperate, Cal Advocates had identified at least four political campaigns by SoCalGas involving at least 40 SoCalGas employees from various business units.[24] Those four campaigns include the C4BES campaign (which included the Vendor Contract that drove speakers to specific Commission Business Meetings), and campaigns to ensure the continued use of natural gas before the Los Angeles Metropolitan Transit Authority (MTA), the Ports of Los Angeles and Long Beach (together the San Pedro Bay Ports or Ports), and the Los Angeles World Airports (comprising the LAX and Van Nuys Airports).[25]

Cal Advocates' finding of a pattern of SoCalGas booking advocacy costs to ratepayers until caught, is reinforced by SoCalGas' admission that it requested over $4 million per year from ratepayers in this General Rate Case for outside legal costs to support the continued use of natural gas.[26] In its data response to CEJA, the utility claims

---

[24] *See* Ex. CA-23-WP 300 - PAO-SCG-112-TBO_Attach_CONF, which is a list containing the names and title of roughly 40 SoCalGas employees who supported in some manner SoCalGas' Political Activities. Documents demonstrating that support include, without limitation, the following Attachments: 2,9 67, 77, 79, 80, 83, 85, and 87. While SoCalGas claims that several of these employees' salaries are booked below the line, most of them are not. Further, this listing is preliminary, and does not purport to identify even a meaningful fraction of SoCalGas employees who support the utility's Political Activities.

[25] *See* Ex. CA-23, pp. 4-24.

[26] Attachment 2 SCG Resp to CEJA-SEU-009, 4-17-23, p. 6, showing adjustment of $4.308 million to GRC Forecast.

those outside legal costs were "unintentionally" booked to ratepayers,[27] and that the "legal services rendered to SoCalGas [] were intended to be recorded below-the-line…"[28] These claims are nearly identical to SoCalGas' claim of "errors" when Cal Advocates found evidence that the utility's lobbying costs were being booked to ratepayer accounts.[29]

The utility asks us to believe that even though it paid the same law firm opposing Berkeley's ordinance to provide advice on the same issues litigated in that lawsuit,[30] and even though it fought disclosure of this information, the legal work it paid for was not used to support the Berkeley litigation.[31]

SoCalGas' withholding of specific information related to this accounting "error" from CEJA for nearly six months, its multi-year practice of misrepresenting the cost and extent of its pro-gas advocacy activities during the Cal Advocates' accounting review,[32] and the fact that the Commission has *twice* found that the utility misused ratepayer funds to advocate for energy efficiency codes and standards in violation of Commission

---

[27] *See* Attachment 2 - SCG Resp to CEJA-SEU-009, 4-17-23, p. 2 (""one or more errors in the underlying data [on outside counsel costs] were identified while responding to discovery." The discovered errors revealed the fact that certain costs identified in the 2021 General Order (GO)-77 Report were unintentionally categorized as costs attributable to account 923 that should not have been categorized as such.")

[28] Attachment 2 - SCG Resp to CEJA-SEU-009, 4-17-23, p. 3.

[29] *See* Ex. CA-23-WP 159 p. 7 ("The Balanced Energy internal order (IO) 300796601 was created in March 2019 for tracking all costs associated with Balanced Energy activities and the intent was to make it a shareholder funded IO. However, an incorrect settlement rule was set up for this IO to FERC 920.0 A&G Salaries, consequently, the costs initially settled to the incorrect FERC account.") and Exs. CA-23-WP 29, 155, and 156 where SoCalGas admits that it booked the costs of three political campaigns to ratepayers, but claimed it intended to remove the costs before the next GRC. *See* Response to Q. 5(b) in each of the three workpapers.

[30] The law firm is Reichman Jorgensen.

[31] Attachment 2 - SCG Resp to CEJA-SEU-009, 4-17-23, p. 3 ("The costs referenced in Question 5(b) include legal services rendered to SoCalGas that were intended to be recorded below-the-line, and included matters related to liability risk management, land use and environmental matters, and existing and proposed federal, state and local laws, and other government actions potentially affecting natural gas service, including the legality of such laws and actions, such as whether they might be preempted by federal law. These costs do not include "legal challenges to local gas bans for new construction such as in *Cal. Restaurant Ass'n v. City of Berkeley* (Docket Nos. 3:19-cv-07668, N.D.Cal and 21-16278, 9th Cir.)."

[32] Ex. CA-23, pp. 6-23.

orders[33] all belie the utility's claims of "error" and certainly render suspect any assertion it may make regarding its use of ratepayer funds for advocacy, including its claim that it did not fund the Berkeley litigation.[34]

III. CONCLUSION

For the reasons set forth above, SoCalGas' Motion to Strike should be denied.

Respectfully submitted,

/s/ Traci Bone
TRACI BONE
Attorney for the

Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-2048
Cell Phone: (415) 713-3599
Email: traci.bone@cpuc.ca.gov

May 18, 2023

[33] *See, e.g.,* D.22-03-010 and D.22-04-034.

[34] Note also that since 2018 the Northern District of California Federal Court, where the Restaurant Association's challenge to the Berkeley ordinance was first litigated, has required parties to disclose the identity of interested entities that may benefit from the litigation, or are funding the litigation. *See* U.S. District Court for the Northern District of California, Standing Order for all Judges of the Northern District of California on the Contents of Joint Case Management System, § 18 ("… each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding. In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.").

ATTACHMENT 1

SoCalGas v. CPUC, 87 Cal. App. 5th 324 (2023)
Lexis Version

Southern California Gas Co. v. Public Utilities Com.

Court of Appeal of California, Second Appellate District, Division One

January 6, 2023, Opinion Filed

B310811

Reporter
87 Cal. App. 5th 324 *; 2023 Cal. App. LEXIS 10 **; 303 Cal. Rptr. 3d 500; 2023 WL 118496

SOUTHERN CALIFORNIA GAS COMPANY, Petitioner, v. PUBLIC UTILITIES COMMISSION, Respondent.

Notice: As modified Feb. 3, 2023.

Subsequent History: Modified by, Rehearing denied by *Southern California Gas Co. v. Public Utilities Com., 2023 Cal. App. LEXIS 78 (Cal. App. 2d Dist., Feb. 3, 2023)*

Time for Granting or Denying Review Extended *S. Cal. Gas Co. v. Puc, 2023 Cal. LEXIS 2280 (Cal., Apr. 5, 2023)*

Review denied by, Request denied by *Southern California Gas Co. v. Public Utilities Commission, 2023 Cal. LEXIS 2095 (Cal., Apr. 19, 2023)*

Prior History: [1]** ORIGINAL PROCEEDING; review of Decision No. D.21-03-001 and Resolution ALJ-391 of the Public Utilities Commission of the State of California.

Disposition: Petition for writ of mandate granted.

Core Terms

ratepayer, shareholder, disclosure, discovery, rights, funds, requests, public utility, contracts, communications, declarations, expenditures, infringement, subpoena, discovery request, entities, governmental interest, due process, affiliation, inspection, sanctions, argues, political activity, accounting system, formal proceeding, chilling effect, natural gas, decarbonization, authorization, Rulemaking

Case Summary

Overview
HOLDINGS: [1]-In a case in which the Public Advocate's Office (PAO), a division of the Public Utilities Commission (PUC), sought to discover whether the political activities of an investor-owned natural gas utility were funded by the utility's shareholders, which is permissible, or ratepayers, which is not, the court concluded that the utility had shown that disclosure of the requested shareholder information would impact its First Amendment rights, and that the PUC failed to show that its interest in determining whether the utility's political efforts were impermissibly funded outweighed that impact. Insofar as the PAO's discovery requests sought information about shareholder expenditures, they exceeded the PAO's mandate to obtain the lowest possible costs for ratepayers and its authority to compel disclosure of information necessary for that task.

Outcome
Petition for writ of mandate granted.

Opinion

[*329]

CHANEY, J.—These original proceedings involve efforts by the Public Utilities Commission (PUC or the Commission) to discover whether the political activities of Southern California Gas Company (SCG) are funded by SCG's shareholders, which is permissible, or ratepayers, which is not. The Commission propounded several discovery requests (called "Data Requests") on SCG, and when **[**2]** SCG failed fully to comply, moved to compel further responses that ultimately resulted in an order to comply or face substantial penalties. SCG seeks a writ of mandate directing the Commission to rescind its order on the ground that the discovery requests infringe on SCG's *First Amendment* rights.

CA(1)[↑] **(1)** We grant the petition. SCG has shown that disclosure of the requested information will impact its *First Amendment* rights, and the Commission failed to show that its interest in determining whether SCG's political efforts are impermissibly funded outweighs that impact.

BACKGROUND

The California Constitution authorizes the Legislature to exercise control over companies delivering heat or power to the public, and authorizes the PUC to "establish rules, examine records, issue subpoenas, … take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (*Cal. Const., art. XII, § 6*.)

In 1985, the Legislature authorized the creation of a division within the Commission, later named the Public Advocate's Office (PAO, the Office, or CalAdvocates), "to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission." (Stats. 2018, ch. 51, § 39.) The PAO's **[**3]** goal is "to obtain the lowest possible rate for service consistent with reliable and safe service levels." (*Pub. Util. Code, § 309.5, subd. (a)*.)[1]

To serve this goal, the PAO is authorized to "compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission." (*§ 309.5, subd. (e)*.) Any objection to a PAO request for production is adjudicated by the PUC. (*Ibid.*)

[*330]

SCG, an investor-owned utility that provides natural gas to the public in several Southern California counties, is subject to Commission regulation and PAO discovery inquiries.

As an investor-owned utility, SCG differentiates between "ratepayer funds" (above-the-line accounts) and "shareholder funds" (below-the-line accounts). Activities or contracts are preliminarily booked to an above-the-line or below-the-line account, with the final ratemaking decision settled at a "general rate case" proceeding (GRC). At a GRC, SCG generally seeks cost recovery from ratepayers only for expenditures in its above-the-line accounts. Expenditures in SCG's below-the-line accounts (i.e., shareholder-funded accounts) are not recovered from ratepayers. In this manner, SCG may use its 100 percent-shareholder-funded accounts **[**4]** to, among other things, advocate for natural gas, renewable gas, and other clean-fuel (e.g., hydrogen) solutions.

A. *PAO Discovery Inquiry*

1. *Rulemaking 19-01-011 proceeding*

On January 31, 2019, the PUC initiated an unrelated proceeding, designated "Rulemaking 19-01-011," regarding building decarbonization. In that proceeding, an association known as Californians for Balanced Energy Solutions (C4BES), which presents itself as "a coalition of natural and renewable natural gas users," moved to obtain party status.[2] The Sierra Club opposed the motion, alleging that C4BES was actually an "astroturfing" group founded and funded by SCG.[3]

2. *Discovery requests before the ALJ*

As a result of the Sierra Club's allegation in Rulemaking 19-01-011 that C4BES was an astroturfing group funded by SCG, the PAO undertook to investigate the

---

[1] Undesignated statutory references will be to the Public Utilities Code.

[2] Available at: <*https://www.publicadvocates.cpuc.ca.gov/general.aspx?id=4444*> (as of Jan. 6, 2023).

[3] Astroturfing is a practice in which corporate sponsors of a message mask their identity by establishing separate organizations to state a position or make it appear as though the movement originates from and has grassroots support.

allegation, and in May 2019, initiated a discovery inquiry into the extent to which SCG used ratepayer funds to support putative grassroots organizations advocating for SCG's antidecarbonization positions. The discovery inquiry, conducted outside any formal proceeding, comprised more than a dozen data requests. We will focus on three data requests and one subpoena.
[*331]

a. *July 2019 Data Request*

On July 19, 2019, the PAO issued **[**5]** a data request to SCG, request no. "CalAdvocates-SC-SCG-2019-04," concerning the financing of SCG's activities.[4]

SCG responded by producing a work order authorization, which in turn contained a balanced energy internal order which accounted for shareholder contributions to fund the work order. The point of SCG's production was to show that it did not use ratepayer contributions to fund astroturf groups.

However, SCG redacted a name or signature from its response, and the work order authorization itself indicated the work *was* billed to a ratepayer-funded account (Federal Energy Regulatory Commission (FERC) account 920.0). (SCG later claimed this was an accounting error, which it corrected to FERC 426.4.) The PAO moved the Commission's administrative law judge (ALJ) to compel a further response, which the ALJ granted.

b. *August 2019 Data Request*

On August 13, 2019, the PAO served SCG with a request for all contracts covered by the work order authorization, request no. "CalAdvocates-SC-SCG-2019-05." In response, SCG produced contracts funded jointly by ratepayers and shareholders, but objected to producing C4BES-related contracts funded solely by shareholders on the ground that to produce them would violate its rights **[**6]** of free speech and association. The PAO moved the ALJ to compel further responses.

(1) *ALJ November 1, 2019 Ruling*

On November 1, 2019, the ALJ granted the PAO's motion to compel further responses to the August 13 request, ordered SCG to produce requested documents within two business days, and denied SCG's request for a two-week stay to afford it an opportunity to appeal the ruling.[5]

(2) *SCG November 1, 2019 Motion To Stay*

On November 1, 2019, SCG moved to reconsider and stay enforcement these rulings.
[*332]

c. *May 2020 Data Requests and Subpoena*

(1) *May 1 Request*

On May 1, 2020, as part of its continuing inquiry into SCG's use of ratepayer monies to fund an antidecarbonization campaign through astroturf organizations, the PAO served request no. "CalAdvocates-TB-SCG-2020-03" on SCG, seeking remote access to SCG's system applications & products accounting system. This accounting system is a large database that includes sensitive financial and nonfinancial material related to SCG's transactions, including vendor invoices, third party payments, workers compensation payments, employee reimbursements, and other attachments relating to approximately 2,000 vendors and other parties. The PAO's request **[**7]** included a request for "information regarding all contracts, invoices, and payments made to third parties," and a request to train and assist a PAO auditor to access SCG's accounts.

(2) *Subpoena*

On May 5, 2020, the PAO served a subpoena on SCG, commanding the utility to provide PAO "staff and consultants" with the same information as set forth in request no. CalAdvocates-TB-SCG-2020-03, including "access to all databases associated in any manner with the company's accounting systems," and "both on-site and remote access … at the times and locations requested by [PAO]," "no later than three business days after service," i.e., by May 8. The focus was on determining, for example, what accounts were used to track shareholder-funded activity, what payments are made from those accounts, and what invoices were submitted in support of those payments. The subpoena was supported with a PAO declaration that SCG's "responses to data requests in the investigation have been incomplete and untimely."

---

[4] To reiterate, the PAO issued this data request outside of the Rulemaking 19-01-011 proceeding, as the scope of that proceeding was limited to building decarbonization matters.

[5] The ALJ assigned by the Commission to handle the matter notified the parties of certain procedural rules to follow since this discovery dispute was outside of any formal proceeding in which the Commission's rules of practice and procedure (title 20, division 1 of the California Code of Regulations) (herein Rules) would directly apply.

(3) *May 8 Request*

On May 8, 2020, the PAO demanded the production of data contained in SCG's accounting system for all "100% shareholder funded" accounts that "house[] costs for activities related to **[**8]** influencing public opinion on decarbonization policies," and "for lobbying activities related to decarbonization policies" (the May 8 data request).

SCG responded by proposing that "access to attachments and invoices [in the accounting system] would be shut off [by default] but could be requested by [PAO's] auditor," at which time "[a]n attorney would then be able to quickly review requested invoices and provide nonprivileged … materials to the auditor." The PAO rejected SCG's proposal.
[*333]

SCG also offered to provide access to approximately 96 percent of the information related to its accounts—shielding only constitutionally protected and/or privileged material—provided that the PAO agreed to a nondisclosure agreement or confidentiality protocol. The PAO rejected this offer as well.

On May 18, 2020, SCG produced fixed copies of two years' worth of its accounting data (2016–2017) for accounts specifically identified by the PAO.

B. *Proceedings Before the Full Commission*

1. *December 2, 2019, and May 22, 2020, SCG Motion for Reconsideration/Appeal and Motion To File Declarations Under Seal*

On December 2, 2019, SCG appealed from and moved the full Commission to reconsider the ALJ's November 1, **[**9]** 2019 ruling. On May 22, 2020, SCG supplemented this motion with (1) a separate motion, and (2) a motion to file certain declarations under seal.

SCG observed that the PAO's discovery inquiry is not itself a formal proceeding, and requested that the inquiry be brought within a formal proceeding by issuance of a Commission order instituting rulemaking or order instituting investigation, which SCG argued would provide more transparency and ensure due process. The PAO opposed this request.

In its motion for reconsideration, SCG argued that the Commission's interest in obtaining information about SCG's political activities and activities that are "100% shareholder-funded" was not compelling because such activities are not subject to Cal Advocates' oversight.

SCG further argued that disclosure of information about political activities and activities that were "100% shareholder funded" would infringe on SCG's *First Amendment* rights.

In support of the motion, Sharon Tomkins, SCG's vice president of strategy and engagement and chief environmental officer, declared, "If the non-public contracts and communications [SCG] has had regarding its political activity to advance natural gas are required to be disclosed **[**10]** in response to the demands of the [PAO], it will alter how [SCG] and its partners, consultants, and others work together and communicate in the future regarding matters of shared political interest." Tomkins declared that SCG's production to date had already "had a chilling effect on [SCG] and [its] ability to engage in activities which are lawful."

Tomkins declared that her work includes "sensitive discussions in furtherance of developing strategy and advocacy associated with natural gas solutions and selecting [SCG's] message and the best means to promote that **[*334]** message. It also has included recommending that others become involved with [SCG] in this political process." She declared that further disclosures to the PAO "will have a chilling effect" on those communications and "could limit [SCG's] future associations" because she and SCG "will need to take into consideration the potential disclosure of such communication in the future as a result of such forced [discovery] disclosure."

Tomkins declared that "Based on conversations [she] had, others may be less likely to associate with [SCG]" if information about its political efforts were disclosed to the Commission.

In further support **[**11]** of its motion for reconsideration, SCG submitted three declarations from private organizations specializing in government relations and public affairs, including statements that disclosure of shareholder information to the Commission would dissuade them from communicating or contracting with SCG.

2. *May 22, 2020 SCG Motion To Quash or Stay the May 5 Subpoena*

Also on May 22, 2020, SCG moved to quash or stay portions of the PAO's May 5, 2020 subpoena to allow SCG an opportunity to implement software solutions to exclude what it deemed to be materials protected by attorney-client and attorney work product privileges, as well as materials implicating *First Amendment* issues.

3. *June 23, 2020 PAO Motion for Contempt and Monetary Sanctions*

On June 23, 2020, the PAO moved the Commission to find SCG in contempt.

4. *July 9, 2020 PAO Motion To Compel and Request for Assessment of Fines*

On July 9, 2020, the PAO moved to compel SCG to produce certain unredacted declarations it had produced to the Commission in December 2019 but not to the PAO, and to assess SCG $100,000 per day in fines retroactive to June 30, 2020.

C. *Commission Ruling: PUC Resolution ALJ-391*

1. *Original Ruling*

On December 21, 2020, the Commission issued **[**12]** PUC resolution ALJ-391, which it later modified, *post*, to become the operative ruling.
[*335]

In it, the Commission rejected SCG's assertion that its *First Amendment* rights to association would be chilled by Data request no. CalAdvocates-SC-SCG-2019-05. Although SCG's declarations attempted to link the disclosure of such documents with a chilling effect on certain communications and contracts with outside entities, such contentions were "primarily hypothetical," and fell short of the threatened harm and "palpable fear of harassment and retaliation in recognized instances of *First Amendment* infringement, such as that in" *NAACP v. Alabama*. The Commission found "no infringement on SCG's *First Amendment* rights by disclosing to the Commission, including Cal Advocates, responses to Data request no. CalAdvocates-SC-SCG-2019-05 seeking documents about its decarbonization campaign."

Even if SCG had established that responding to the data request would chill communications, the Commission found that the government's compelling interest in disclosure outweighed the chilling effect. The Commission flatly rejected SCG's argument that it had no authority to inspect the records of investor-owned utilities concerning political activities. On the **[**13]** contrary, a compelling government interest existed where the PAO's requests for information about SCG's decarbonization campaign were consistent with its statutory authority to regulate investor-owned utilities.

Resolution ALJ-391 ordered SCG to comply with the PAO's discovery requests, but deferred the matter of sanctions to a later date.

SCG moved for a rehearing on resolution ALJ-391, and moved to stay enforcement. On December 30, 2020, SCG sought an extension of time to comply with the resolution, which the Commission granted.

On December 30 and 31, 2020, the PAO moved to expedite the Commission's ruling on resolution ALJ-391, sought an extension of time to respond to SCG's motion for rehearing, and propounded four more data requests on SCG.

2. *Modified Ruling*

On March 2, 2021, the Commission issued an order modifying resolution ALJ-391 and denying SCG's request for a rehearing and its motion for a stay.

The Commission found that a "utility may [not] unilaterally designate certain topics off-limits to Commission oversight," and PAO discovery is the "least restrictive means of obtaining the desired information." The Commission rejected SCG's argument that the PAO's discovery rights were **[**14]** limited by SCG's *First Amendment* right to association, as well as its argument that **[*336]** conducting the discovery inquiry outside the confines of a formal proceeding violated SCG's procedural due process rights.

The Commission ordered SCG to produce the information and documents responsive to request no. CalAdvocates-SC-SCG-2019-05, including confidential declarations submitted under seal to the Commission but not the PAO, and to comply with the May 5, 2020 subpoena within 30 days of the effective date of the resolution. Although the Commission ordered SCG to provide access to unredacted versions of its confidential declarations under existing protections, it permitted the utility to file confidential versions of certain declarations under seal. The Commission deferred consideration of the PAO's motions for contempt, sanctions and fines.

D. *Summary*

In sum, this dispute started when, in a formal Commission proceeding, Rulemaking 19-01-011, the Sierra Club exposed a potential financial relationship between SCG and C4BES. Based on the record of that proceeding, there was no transparency as to whether the Sierra Club's allegation was correct or, if it was, whether C4BES was funded by SCG's ratepayers as opposed to shareholders. **[**15]** The PAO submitted a series of discreet data requests to SCG outside of any proceeding, which led to the request in question, Data

request no. CalAdvocates-SC-SCG-2019-05, designed to discover whether SCG used ratepayer funds to finance astroturf groups. SCG partially complied with the request but has always maintained that its shareholder information (not its ratepayer information) is privileged by constitutional rights to free speech and freedom of association. The ALJ and full Commission both disagreed with SCG's position.

We granted SCG's petition for a writ of review of the Commission's resolution of the dispute. The Commission filed a response supporting its decision, and SCG filed a reply challenging it. We also granted the requests of several entities to file amicus briefs.

DISCUSSION

SCG contends (1) the Commission exceeded its constitutional and statutory authority by requiring SCG to comply with the PAO's discovery requests pertaining to shareholder accounts; (2) the requests infringe on SCG's *First Amendment* right of association insofar as they pertain to shareholder accounts; and (3) conducting this dispute as a discovery matter rather than a formal proceeding violates procedural due process. **[**16]**
[*337]

A. *PAO Authority*

HN1[↑] ***CA(2)***[↑] **(2)** The Commission is authorized to supervise and regulate utility monopolies. "PUC's authority derives not only from statute but from the California Constitution, which creates the agency and expressly gives it the power to fix rates for public utilities. (*Cal. Const., art. XII, §§ 1*, *6*.) Statutorily, PUC is authorized to supervise and regulate public utilities and to 'do all things … which are necessary and convenient in the exercise of such power and jurisdiction' (*§ 701*) … . Adverting to these provisions, we have described PUC as '"a state agency of constitutional origin with far-reaching duties, functions and powers"' whose '"power to fix rates [and] establish rules"' has been '"liberally construed."'" (*Southern California Edison Co. v. Peevey (2003) 31 Cal.4th 781, 792 [3 Cal. Rptr. 3d 703, 74 P.3d 795]*.)

The Commission may hold hearings and establish procedures to carry out its mandate. (See *Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal.3d 891, 905 [160 Cal. Rptr. 124, 603 P.2d 41]* (plur. opn.); see also *Cal. Const., art. XII, §§ 1–6*.)

"The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. The commission, each commissioner, and any officer of the commission or any employee authorized to administer oaths may examine under oath any officer, agent, or employee of a public utility in relation to its **[**17]** business and affairs. Any person, other than a commissioner or an officer of the commission, demanding to make any inspection shall produce, under the hand and seal of the commission, authorization to make the inspection. A written record of the testimony or statement so given under oath shall be made and filed with the commission." (*§ 314, subd. (a)*.)

These powers apply "to inspections of the accounts, books, papers, and documents of any business that is a subsidiary or affiliate of, or a corporation that holds a controlling interest in, an electrical, gas, or telephone corporation … with respect to any transaction between the … corporation and the subsidiary, affiliate, or holding corporation *on any matter that might adversely affect the interests of the ratepayers* … ." (*§ 314, subd. (b)*, italics added.)

"Every public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission. [¶] Every public utility receiving from the commission any blanks with directions to fill **[**18]** them shall answer fully and correctly each **[*338]** question propounded therein, and if it is unable to answer any question, it shall give a good and sufficient reason for such failure." (*§ 581*.)

"Whenever required by the commission, every public utility shall deliver to the commission copies of any or all maps, profiles, contracts, agreements, franchises, reports, books, accounts, papers, and records in its possession or in any way relating to its property or affecting its business, and also a complete inventory of all its property in such form as the commission may direct." (*§ 582*.)

"Every public utility shall furnish such reports to the commission at such time and in such form as the commission may require in which the utility shall specifically answer all questions propounded by the commission. The commission may require any public utility to file monthly reports of earnings and expenses, and to file periodical or special reports, or both,

concerning any matter about which the commission is authorized by any law to inquire or to keep itself informed, or which it is required to enforce. All reports shall be under oath when required by the commission." (§ 584.)

Commission employees are authorized to "enter **[**19]** upon any premises occupied by any public utility, for the purpose of making the examinations and tests and exercising any of the other powers provided for in this part," and to "set up and use on such premises any apparatus and appliances necessary therefor." (§ 771.)

HN2[↑] CA(3)[↑] **(3)** As noted, in 1985 the Legislature authorized creation of the PAO's predecessor, the ultimate purpose of which was "to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission." (Stats. 2018, ch. 51, § 39.)

The PAO is authorized to "compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the commission, provided that any objections to any request for information shall be decided in writing by the assigned commissioner or by the president of the commission, if there is no assigned commissioner." (§ 309.5, subd. (e).) Any objection to a PAO request for production is adjudicated by the PUC. (*Ibid.*)

"No information furnished to the commission by a public utility … , except those matters specifically required to be open to public inspection … , shall be open to public inspection or made public, except on order of the commission … or a commissioner **[**20]** in the course of a hearing or proceeding." (§ 583, subd. (a).)

SCG, as a public utility, is subject to the Commission's jurisdiction. (§§ 216, 218.)
[*339]

B. *Standard of Review*

"[A]ny aggrieved party may petition for a writ of review in the court of appeal." (§ 1756, subd. (a); see also Pacific Bell v. Public Utilities Com. (2000) 79 Cal.App.4th 269, 278 [93 Cal. Rptr. 2d 910].)

CA(4)[↑] **(4)** HN3[↑] "There is a strong presumption of validity of the commission's decisions." (Greyhound Lines, Inc. v. Public Utilities Com. (1968) 68 Cal.2d 406, 410 [67 Cal. Rptr. 97, 438 P.2d 801] (Greyhound).)

Review of a Commission decision "shall not extend further than to determine, on the basis of the entire record … whether any of the following occurred: [¶] (1) The commission acted without, or in excess of, its powers or jurisdiction. [¶] (2) The commission has not proceeded in the manner required by law. [¶] (3) The decision of the commission is not supported by the findings. [¶] (4) The findings in the decision of the commission are not supported by substantial evidence. [¶] (5) The order or decision was procured by fraud or was an abuse of discretion. [¶] (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution." (§ 1757, subd. (a)(1)–(6).)

HN4[↑] We give great weight to the Commission's interpretation of the Public Utilities Code, as that agency is constitutionally authorized to administer its provisions **[**21]** (Southern California Edison v. Peevey, supra, 31 Cal.4th at p. 796), and will disturb its interpretation only if "it fails to bear a reasonable relation to statutory purposes and language" (Greyhound, supra, 68 Cal.2d at pp. 410–411). We do not conduct a trial de novo, nor weigh nor exercise independent judgment on the evidence. (§ 1757, subd. (b); see Eden Hospital Dist. v. Belshé (1998) 65 Cal.App.4th 908, 915 [76 Cal. Rptr. 2d 857].) The Commission's findings of fact "'are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence. [Citation.] … "When conflicting evidence is presented from which conflicting inferences can be drawn, the PUC's findings are final."'" (Clean Energy Fuels Corp. v. Public Utilities Com. (2014) 227 Cal.App.4th 641, 649 [174 Cal. Rptr. 3d 297]; see also Toward Utility Rate Normalization v. Public Utilities Com. (1978) 22 Cal.3d 529, 537–538 [149 Cal. Rptr. 692, 585 P.2d 491].)

"Notwithstanding Section[] 1757 … , in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall **[*340]** not be final." (§ 1760.) HN5[↑] "But even the presence of a constitutional dispute does not require the reviewing court to adopt de novo or independent review. Even there, 'the question of the weight of the evidence in determining issues **[**22]** of fact lies with the commission acting within its statutory authority; the "judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may

properly attach to findings upon hearing and evidence.'" [Citation.] In other words, judicial reweighing of evidence and testimony is ordinarily not permitted." (*Pacific Gas & Electric Co. v. Public Utilities Com. (2015) 237 Cal.App.4th 812, 838 [188 Cal. Rptr. 3d 374]*.)

C. *Application*

Pursuant to the Commission's broad constitutional and statutory authority, SCG is required to respond to the PAO's data requests of its SAP accounting system unless to do so would violate SCG's constitutional rights.

SCG argues the PAO's data requests infringe on its *First Amendment* rights with no substantial relation between the requests and a sufficiently important governmental interest. We agree.

1. *SCG's Due Process Rights*

SCG contends that the PAO's discovery "non-proceedings" constitute a "largely rules-free no-man's-land" of "unbounded discovery and investigatory authority." It argues that conducting this dispute as a discovery matter outside the confines of a formal proceeding, where the Commission's rules of practice and procedure and filing requirements do not directly apply, violates procedural due process. We disagree.

HN6[↑] ***CA(5)***[↑] **(5)** A regulatory **[**23]** agency enjoys flexibility in fashioning the procedures necessary to exercise its responsibilities. Nevertheless, the PAO's use of ad hoc procedures must be consistent with due process. (*San Pablo Bay Pipeline Co., LLC v. Public Utilities Com. (2015) 243 Cal.App.4th 295, 313 [196 Cal. Rptr. 3d 609]*; *Cal. Const., art. XII, § 2* [Commission procedures are "[s]ubject to statute and due process"].)

HN7[↑] Procedural due process requires that a party be given notice and an opportunity to be heard when a government action threatens deprivation of liberty or property. (*Board of Regents v. Roth (1972) 408 U.S. 564, 569–571 [33 L. Ed. 2d 548, 92 S. Ct. 2701]*.)

Here, the dispute started when, in a formal Commission proceeding, Rulemaking 19-01-011, a potential financial relationship between SCG and **[*341]** C4BES came to light in a pleading filed by the Sierra Club. Based on the record of that proceeding, the PAO submitted a series of discreet Data Requests to SCG outside of any proceeding, which led to the Data Request in question, Data request no. CalAdvocates-SC-SCG-2019-05, designed to discover whether SCG used ratepayer funds to finance astroturf groups. SCG only partially complied with the request, maintaining that its shareholder information (not its ratepayer information) was privileged by constitutional rights to free speech and freedom of association.

The PAO then invoked *section 309.5*, which allows it to compel "production or disclosure of any **[**24]** information it deems necessary to perform its duties from any entity regulated by the commission" and to bring any resulting discovery disputes to the President of the Commission.

The president of the Commission referred the matter to the chief administrative law judge to provide for a procedural path to address the dispute. The chief administrative law judge assigned an ALJ to preside over the dispute, and provided the parties with certain procedural rules to follow.

At each step of this process, the PAO defended discreet discovery requests focused on the information needed to perform its statutory duties. SCG had an opportunity to challenge the PAO's motions, submit motions itself, and move for the full Commission to act on its requests. SCG neither requested evidentiary hearings nor contested relying on written pleadings to resolve the issues set forth herein.

Under these circumstances, we conclude SCG has been afforded ample due process.

2. *SCG's First Amendment Rights*

HN8[↑] ***CA(6)***[↑] **(6)** "The *First Amendment* prohibits government from 'abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' This [includes] … 'a corresponding **[**25]** right to associate with others.' [Citation.] Protected association furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.' [Citation.] Government infringement of this freedom 'can take a number of forms.'" (*Americans for Prosperity Foundation v. Bonta (2021) 594 U.S. ___ [210 L.Ed.2d 716, 726–727, 141 S.Ct. 2373, 2382] (Americans for Prosperity)*.) For example, freedom of association may be violated "where individuals are punished for their political affiliation," "or where members of an organization are denied benefits based on the organization's message." (*Ibid.*)

[*342]

"[C]ompelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." (*N. A. A. C. P. v. Alabama (1958) 357 U.S. 449, 462 [2 L.Ed.2d 1488, 78 S.Ct. 1163] (NAACP v. Alabama)*.) "*NAACP v. Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. [Citation.] In response, NAACP members were threatened with economic reprisals and violence. [Citation.] As part of an effort to oust the organization from the State, the Alabama Attorney **[**26]** General sought the group's membership lists. [Citation.] We held that the *First Amendment* prohibited such compelled disclosure." (*Americans for Prosperity, supra, 210 L.Ed.2d at pp. 726–727*.) The Supreme Court explained that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and noted there was a "vital relationship between freedom to associate and privacy in one's associations." (*NAACP v. Alabama*, at pp. 460, 462.) "Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest 'sufficient to justify the deterrent effect' of disclosure, [citation]—we concluded that the State's demand violated the *First Amendment*." (*Americans for Prosperity, at p. 727*.)

HN9[↑] ***CA(7)***[↑] **(7)** When compelled disclosure is challenged on *First Amendment* grounds, we apply a standard of "exacting scrutiny" to the government's action. (*Americans for Prosperity, supra, 210 L.Ed.2d at p. 727*.) "Under that standard, there must be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest.' [Citation.] 'To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on *First Amendment* rights.' [Citation.] Such scrutiny … is appropriate **[**27]** given the 'deterrent effect on the exercise of *First Amendment* rights' that arises as an 'inevitable result of the government's conduct in requiring disclosure.'" (*Ibid.*)

HN10[↑] ***CA(8)***[↑] **(8)** "A party who objects to a discovery request as an infringement of the party's *First Amendment* rights is in essence asserting a *First Amendment* privilege." (*Perry v. Schwarzenegger (2010) 591 F.3d 1147, 1160.*) "[A] claim of *First Amendment* privilege is subject to a two-part framework. The party asserting the privilege 'must demonstrate … a "prima facie showing of arguable *first amendment* infringement."' [Citation.] 'This *prima facie* showing requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or "chilling" of, the members' associational rights.' [Citation.] [¶] 'If appellants can make the necessary *prima facie* showing, the evidentiary burden will then shift to the government … [to] demonstrate that **[*343]** the information sought through the [discovery] is rationally related to a compelling governmental interest … [and] the "least restrictive means" of obtaining the desired information.'" (*Id. at pp. 1160–1161*, fn. omitted.) "To implement this standard, we 'balance the burdens **[**28]** imposed on individuals and associations against the significance of the … interest in disclosure,' [citation], to determine whether the 'interest in disclosure … outweighs the harm.'" (*Id. at p. 1161*.) This balancing may consider, for example, the seriousness of the threat to the exercise of *First Amendment* rights against the substantiality of the state's interest. (*Ibid.*) "The argument in favor of upholding the claim of privilege will ordinarily grow stronger as the danger to rights of expression and association increases." (*Black Panther Party v. Smith (D.C. Cir. 1981) 213 U.S. App.D.C. 67 [661 F.2d 1243, 1267]*.)

HN11[↑] ***CA(9)***[↑] **(9)** A prima facie showing requires more than bare allegations of possible *First Amendment* violations. "'[T]he record must contain "objective and articulable facts, which go beyond broad allegations or subjective fears."'" (*Dole v. Local Union 375, Plumbers Intern. Union of America, AFL-CIO (9th Cir. 1990) 921 F.2d 969, 973 (Dole)*; see also *Brock v. Local 375 (9th Cir. 1988) 860 F.2d 346, 350, fn. 1*.)

Here, SCG argued before the Commission, and reasserts in these writ proceedings, that Data request no. CalAdvocates-SC-SCG-2019-05 seeks information about shareholder funding of SCG's decarbonization campaign, which constitutes political activity. SCG argues that insofar as the PAO seeks this information, its data request chills its *First Amendment* rights.

In support of its argument, Sharon Tomkins, SCG's vice president of strategy and engagement and chief environmental officer, declared **[**29]** that if SCG's nonpublic contracts and communications were disclosed to the Commission there would be a "chilling effect on [SCG] and [its] ability to engage in activities which are lawful," which "could limit [SCG's] future associations" because she and SCG would "need to take into

consideration the potential disclosure of [sensitive communications] in the future as a result of such forced [discovery] disclosure." Tomkins declared that "Based on conversations [she] had, others may be less likely to associate with [SCG]" if information about its political efforts were disclosed to the Commission. Three declarants from private organizations specializing in government relations and public affairs stated that disclosure of shareholder information to the Commission would dissuade them from communicating or contracting with SCG.

Tomkins's concern that disclosure of political information to the Commission will cause her to "take into consideration" whether sensitive communications will be revealed constitutes nothing more than a circular argument about **[*344]** a subjective fear. Tomkins said nothing about how the requested disclosure "is itself inherently damaging to the organization or will incite **[**30]** other consequences that objectively could dissuade persons from affiliating with the organization." (*Dole, supra, 921 F.2d at p. 974*.) In *NAACP v. Alabama*, for example, the NAACP proved that disclosure of its membership roles would subject its members to economic reprisals and threats of physical coercion. (*NAACP v. Alabama, supra, 357 U.S. at p. 462*.)

However, Tomkins voiced a concern about membership discouragement or withdrawal, supported by three declarations from representatives of entities who stated they would be less likely to associate with SCG if information about their political efforts were disclosed to the Commission. These declarations presented objective and articulable facts, beyond broad allegations or subjective fears, suggesting that enforcement of the data requests insofar as they pertained to shareholder expenditures would incite "consequences that objectively could dissuade persons from affiliating with the organization." (*Dole, supra, 921 F.2d at pp. 973, 974*.) It is not SCG's subjective fear that disclosure of shareholder expenditure information would dissuade third parties from communicating or contracting with SCG: Several third parties told them it would.

The Commission argues that pursuant to *section 583*, which prohibits public disclosure of information obtained by the PAO in **[**31]** discovery, shareholder information disclosed to the PAO would remain confidential. The point is irrelevant because SCG's evidence demonstrates that disclosure to the PAO itself would chill third parties from associating with the utility.

Because SCG demonstrated that a threat to its constitutional rights exists, the burden shifted to the Commission to demonstrate that the data requests serve and are narrowly tailored to a compelling governmental interest.

3. *Governmental Interests*

HN12[↑] ***CA(10)***[↑] **(10)** A governmental entity seeking discovery must show that the information sought is highly relevant to the claims or defenses in the proceeding at hand. (*Perry v. Schwarzenegger, supra, 591 F.3d at pp. 1160–1161*.) "The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable." (*Id. at p. 1161*.)

HN13[↑] ***CA(11)***[↑] **(11)** A regulated utility may not use ratepayer funds for advocacy-related activities that are political or do not otherwise benefit ratepayers. (*Southern California Edison Co. (Nov. 29, 2012) Cal.P.U.C. Dec. No. 12-11-051 [2012 Cal.P.U.C. Lexis 555, *765]* [finding that membership subscriptions to organizations that advance tax reduction policies are inherently political, and **[*345]** funding should not be permitted under rate recovery]; *Southern California Gas Co. (Dec. 29, 1993) Cal.P.U.C. Dec. No. 93-12-043 [1993 Cal.P.U.C. Lexis 728, *103]* [finding that "ratepayers should not have to bear the costs of public relations efforts **[**32]** in this area, which according to [SCG], are designed primarily to increase load by promoting natural gas use to business and government leaders"].)

HN14[↑] ***CA(12)***[↑] **(12)** The PAO's statutory mandate is to "obtain the lowest possible rate for service," primarily for residential and small commercial customers. (*§ 309.5, subd. (a)*.) In service of this mandate, the PAO may compel regulated entities to produce or disclose information "necessary to perform its duties"—i.e., information relating to "rate[s] for service." (*Id. at subds. (a)*, *(e)*; see *§ 314*.)

As an investor-owned utility, SCG differentiates between shareholder funds and ratepayer funds, and claims to use only shareholder funds for lobbying activities. Although regulation of the utility requires understanding whether SCG provides accurate information regarding the allocation of its advocacy costs between ratepayer and shareholder accounts, this may be learned simply by examining ratepayer expenditures. If ratepayers do not pay for advocacy-related activities, the PAO's mandate is satisfied.

However, the PAO's discovery inquiries into all sources of funding for SCG's lobbying activities go beyond ratepayer expenditures. Insofar as the requests seek information about shareholder **[**33]** expenditures, they exceed the PAO's mandate to obtain the lowest possible costs for ratepayers and its authority to compel disclosure of information necessary for that task.

The requests therefore are not carefully tailored to avoid unnecessary interference with SCG's protected activities.

CA(13)[↑] **(13)** The Commission argues that the PAO's discovery rights are "essentially coextensive" with the Commission's own rights. We disagree. ***HN15***[↑] The PAO is authorized to compel only that discovery which is "necessary to perform its duties." (*§ 309.5, subd. (e)*.) The PAO's and Commission's discovery rights would be coextensive only if their duties were the same, which of course they are not. (See *§ 309.5, subd. (a)* [explaining the PAO's mandate].)

The Commission argues the PAO is authorized to ensure that "advocacy costs have been booked to the appropriate utility accounts." With respect, we disagree. The PAO is authorized to ensure only that advocacy costs are *not* booked to *ratepayer* accounts. This it may do by examining ratepayer, not shareholder, accounts. SCG has repeatedly offered access to ratepayer accounts.
[*346]

The Commission argues that sometimes SCG misclassifies expenditures, and has at times moved expenditures from ratepayer to shareholder accounts. **[**34]** But this just shows that a less invasive discovery process is working, and the PAO can confirm that no funds have been misclassified to ratepayer accounts by reviewing above-the-line accounts.

4. *Contempt and Sanctions*

In its briefing and at oral argument petitioner raised the issue of looming sanctions based on actual or potential contempt findings, although no sanctions are currently accreting. Because we will vacate resolution ALJ-391 insofar as it compels disclosure of shareholder expenditures, no basis for sanctions exists.

DISPOSITION

The petition for writ of mandate is granted. Commission resolution ALJ-391 is vacated with respect to shareholder data sought by the Commission for which petitioner asserts its *First Amendment* right of association. resolution ALJ-391 is affirmed in all other respects.

Rothschild, P. J., and Bendix, J., concurred.

End of Document

ATTACHMENT 2

CEJA-SEU-009-3RD SUPPLEMENTAL_Q5b_12368

Data Request Number: CEJA-SEU-009

Proceeding Name: A2205015_016 - SoCalGas and SDGE 2024 GRC

Publish To: California Environmental Justice Alliance
Date Received: 10/28/2022 **Date Responded:** 11/16/2022 **Date Supplemented:** 1/20/2023
Date 2nd Supplemental: 2/17/2023
Date 3rd Supplemental: 4/17/2023

5. The response to Data Request CEJA-SEU-08, Q.12 states that the $1,143,592 listed under account number 923 for the law firm Reichman Jorgensen LLP is considered a ratepayer cost.

   b. Do any of these costs include legal services related to potential federal preemption of local ordinances banning gas connections in new construction and/or legal challenges to local gas bans for new construction such as in Cal. Restaurant Ass'n v. City of Berkeley (Docket Nos. 3:19-cv-07668, N.D.Cal and 21-16278, 9th Cir.)

SoCalGas Response 5b:

SoCalGas objects to this question to the extent it seeks communications or other materials that are subject to the attorney-client privilege and/or the work product doctrine. *See So Cal Gas Co. v. Pub. Util. Comm'n*, 50 Cal.3d 31, 39 (1990) ("[w]e conclude that the commission's powers pursuant to the state Constitution in this context are subject to the statutory limitation of the attorney-client privilege."). SoCalGas also objects on the grounds that it requests information that is irrelevant, outside the scope of the testimony, and/or is unlikely to lead to the discovery of admissible evidence.

Supplemental SEU Response 5b:

Please see the objection and responses to Question 5a and Supplemental Response 5a.

Second Supplemental SEU Response 5b:

SoCalGas reaffirms its objections and responses to Question 5a and Supplemental Response 5a. SoCalGas further incorporates the additional objection and explanation provided in response to Question 4.

Subject to and notwithstanding these objections, SoCalGas further responds as follows:

Please note that the information provided in the GO-77M report is not generated in the same manner as the data supporting Applicants' TY 2024 GRC forecasts. Please see SEU Privilege Log.

Data Request Number: CEJA-SEU-009

Proceeding Name: A2205015_016 - SoCalGas and SDGE 2024 GRC

Publish To: California Environmental Justice Alliance
Date Received: 10/28/2022 **Date Responded:** 11/16/2022 **Date Supplemented:** 1/20/2023
Date 2nd Supplemental: 2/17/2023
Date 3rd Supplemental: 4/17/2023

Third Supplemental SEU Response 5b:

SoCalGas reaffirms its objections and responses to Question 5a and Supplemental Response 5a. SoCalGas further incorporates the additional objection and explanation provided in response to Question 4.

SoCalGas provides this additional supplemental response in compliance with the April 11, 2023 Administrative Law Judge's Ruling Granting California Environmental Justice Alliance's Motion to Compel ("Ruling"). The Ruling requires SoCalGas to "respond to Data Request CEJA-SEU-09, Question 5(b) with matter descriptions that are sufficiently detailed to determine whether these expenses may be reasonably charged to ratepayers."[1]

Question 5(b) above is prefaced by the statement: "The response to Data Request CEJA-SEU-08, Q.12 states that the $1,143,592 listed under account number 923 for the law firm Reichman Jorgensen LLP is considered a ratepayer cost."

As previously disclosed in SoCalGas's second supplemental response to CEJA-SEU-009, Request 4 (dated February 17, 2023), "one or more errors in the underlying data [on outside counsel costs] were identified while responding to discovery." The discovered errors revealed the fact that certain costs identified in the 2021 General Order (GO)-77 Report were unintentionally categorized as costs attributable to account 923 that should not have been categorized as such. Applicants' February 22, 2023 Response to CEJA's Motion (at 2) also noted "an error in the underlying data, which led them to expend significant additional efforts to review the underlying data for quality control/assurance purposes and determine what information could be provided in a privilege log (without waiving privilege)."[2] To resolve the disputed issue and correct the error while a thorough review of the data was underway, while protecting privileged information, SoCalGas committed to remove all Reichman Jorgensen costs identified in the response from the underlying data supporting its GRC forecast.[3]

---

[1] Administrative Law Judge's Ruling Granting California Environmental Justice Alliance's Motion to Compel (April 11, 2023) at 3 – 4.

[2] Response in Opposition of Southern California Gas Company and San Diego Gas & Electric Company to Motion to Compel (February 22, 2023) (Response) at 2. Further, the Response stated:

> Applicants are continuing to review the data and assess impacts of corrections to the underlying data supporting the TY 2024 outside legal forecast. Applicants will correct this forecast, which is anticipated as a downward adjustment, at their next opportunity for revisions to testimony and workpapers.

[3] *See* Response at 3 ("Despite CEJA's lack of agreement, Applicants will remove all Reichman Jorgensen costs from the costs supporting Applicants' forecast, which renders the Motion to Compel with respect to Question 5(b) moot.").

SoCalGas thereafter reviewed and corrected the underlying data supporting its original legal forecast, and accordingly corrected its legal forecast, including corrections to ensure that the erroneously identified Reichman Jorgensen costs would not inform the forecasting methodology. SoCalGas described this review and correction process in an Introductory Statement to its Second Supplemental Response to CEJA-SEU-009 dated March 20, 2023, which is appended to this response. Thus, the Reichman Jorgensen costs identified in CEJA-SEU-08, Q.12, like other legal costs removed that should not form the basis for SoCalGas's GRC forecast, are not ratepayer costs. As part of SoCalGas's response to the Ruling, SoCalGas is therefore also issuing a correction to CEJA-SEU-08, Q.12.

Subject to and without waiving the foregoing objections and background facts, SoCalGas responds, under protest with respect to whether information may be attorney-client privileged, as follows:

The costs referenced in Question 5(b) include legal services rendered to SoCalGas that were intended to be recorded below-the-line, and included matters related to liability risk management, land use and environmental matters, and existing and proposed federal, state and local laws, and other government actions potentially affecting natural gas service, including the legality of such laws and actions, such as whether they might be preempted by federal law. These costs do not include "legal challenges to local gas bans for new construction such as in *Cal. Restaurant Ass'n v. City of Berkeley* (Docket Nos. 3:19-cv-07668, N.D.Cal and 21-16278, 9th Cir.)."

Data Request Number: CEJA-SEU-009

Proceeding Name: A2205015_016 - SoCalGas and SDGE 2024 GRC

Publish To: California Environmental Justice Alliance
Date Received: 10/28/2022 **Date Responded:** 11/16/2022 **Date Supplemented:** 1/20/2023
Date 2nd Supplemental: 2/17/2023
Date 3rd Supplemental: 4/17/2023

APPENDIX

CEJA-SEU-009 Introductory Statement, dated March 20, 2023

Data Request Number: CEJA-SEU-009

Proceeding Name: A2205015_016 - SoCalGas and SDGE 2024 GRC

Publish To: California Environment Justice Association

Date Received: 10/28/2022

Date Responded: 03/20/2023

Introductory Statement

Consistent with the Companies' statement in the joint *Response in Opposition Of Southern California Gas Company and San Diego Gas & Electric Company to Motion to Compel*, filed on February 22, 2023 (Response), SoCalGas and SDG&E (Applicants) explained that errors had been discovered in the underlying data that will impact the "TY 2024 forecast for outside legal, as shown in Exhibit SCG-23-R/SDG&E-27-R and supporting workpapers."[1] SoCalGas and SDG&E committed to "correct this forecast, which is anticipated as a downward adjustment, at their next opportunity for revisions to testimony and workpapers."[2]

In accordance with Applicants' Response, the following, accessible to all parties to the proceeding via the Applicant's Discovery Portal, revises the TY 2024 forecast for outside legal costs in Exhibit SCG-23-R/SDG&E-27-R and the supporting workpapers.

The Applicants' forecast for the TY 2024 outside legal costs in this GRC, consistent with the approach utilized and approved in prior GRCs, begins with paid invoices.[3] The forecast is "based on a trend method that uses recorded expense levels going back five years through the 2021 base year, adjusted for any non-recoverable matters or those considered significant and non-recurring."[4] Because five years of historical aggregated data was utilized in the forecasting method for outside legal costs, the Applicants reviewed costs for individual matters for SoCalGas, SDG&E, and Sempra (to the extent such data was allocated to the Applicants) for each of the years 2017-2021 and 2022, and additional adjustments were made.

[1] Response in Opposition of Southern California Gas Company and San Diego Gas & Electric Company to Motion to Compel (February 22, 2023) at 2.
[2] *Id.*
[3] *See* D.19-09-051 at 504-505 and 508-509.
[4] Exhibit SCG-23-R/SDG&E-27-R, Revised Prepared Direct Testimony of Derick R. Cooper (Corporate Center – General Administration) (August 2022) at DRC-54.

Introductory Statement (Continued)

Starting with the adjusted recorded data in 2017-2021, the Applicants recreated their forecasts for 2022-2024, as provided in the testimony and workpapers associated with Exhibit SCG-23-R/SDG&E-27-R. The table below provides a summary of the resulting TY 2024 forecast and constitutes a decrease compared to the request in Exhibit SCG-23-R/SDG&E-27-R:

Outside Legal

(2021 $ - 000's)

	3/20/2023 Update [1]		Ex. SCG-23-R/SDG&E-27-R [2]		Difference	
	Base Year 2021	Forecast 2024	Base Year 2021	Forecast 2024	Base Year 2021	Forecast 2024
SDG&E	7,598	9,254	9,943	10,691	(2,345)	(1,437)
SoCalGas	11,877	10,277	15,856	13,148	(3,980)	(2,871)
Total Utility	**19,475**	**19,531**	**25,800**	**23,839**	**(6,325)**	**(4,308)**

[1] Submitted in CEJA-SEU-009 Introductory Statement

[2] Submitted in August 2022

In the separately attached Excel spreadsheet, "CEJA-SEU-009_ATTCH_Introductory Statement_Testimony Table Updates", the Applicants' have revised the applicable tables from Exhibit SCG-23-R/SDG&E-27-R to reflect the corrected forecast. As indicated in their Response, the Applicants will also correct Exhibit SCG-23-R/SDG&E-27-R and workpapers, as necessary, in rebuttal testimony and capture the resulting reduction in the revenue requirement during the update testimony phase.

Data Request Number: CEJA-SEU-009

Proceeding Name: A2205015_016 - SoCalGas and SDGE 2024 GRC

Publish To: California Environment Justice Association

Date Received: 10/28/2022

Date Responded: 03/20/2023

Please note the following two questions reference joint SCG/SDG&E Testimony

3. Refer to Exhibit SCG-R/SDG&E-27-R at DRC-51:17. Please identify the matter(s) that counsel worked on related to "Natural Gas Vehicle development" and the cost of each matter that was booked to an account that contributes to the revenue requirement request in this case.

4. Refer to Exhibit SCG-R/SDG&E-27-R at DRC-45. Please identify all matters for which SoCalGas, SDG&E or Sempra retained outside counsel in 2021 that contribute to the revenue requirement request, and the costs incurred related to each matter.